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IN THE

Supreme Court of the United States

OCTOBER TERM, 1954.

No. 228

DAVE KAYE AND SOLLY ISAACS,
Petitioners,

vs.

STATE OF FLORIDA,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF FLORIDA.

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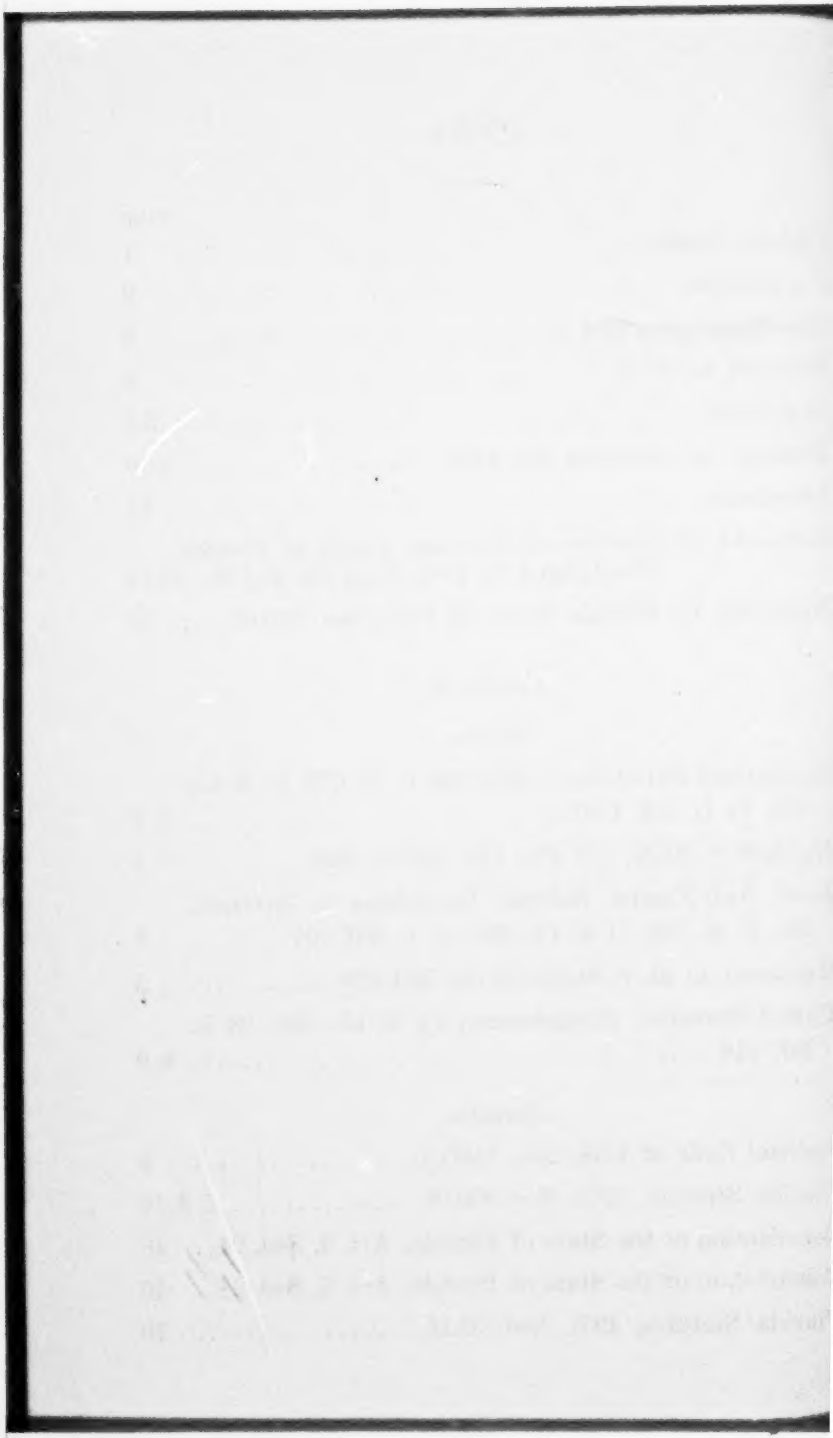

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STATE OF FLORIDA,
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PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF FLORIDA.

Petitioners Dave Kaye and Solly Isaacs and each of them pray that a writ of certiorari issue herein to review the judgment of the Supreme Court of Florida entered in the above cause on April 13, 1954.

THE OPINION BELOW.

The opinion of the Supreme Court of the State of Florida was filed April 13, 1954. The opinion is as yet unreported in the Florida or Southern reports.

A copy of the opinion is appended hereto as Appendix A.

THE JURISDICTION OF THIS COURT.

The judgment of the Supreme Court of Florida herein sought to be reviewed was entered April 13, 1954.

The petition for rehearing filed by petitioners was denied by the Supreme Court of Florida on May 27, 1954.

The jurisdiction of the United States Supreme Court is sought to be invoked under Title 28 U. S. Code, Sec. 1257 (3).

QUESTIONS PRESENTED FOR REVIEW.

Did the Supreme Court of Florida deprive petitioners of their privileges and immunities and of due process of law under Amendment XIV of the Constitution of the United States in refusing to give petitioners the protection afforded them by the Florida statute (Section 920.09, Florida Statutes, 1951)?

STATUTES INVOLVED.

The pertinent statute of the State of Florida involved in this petition is Section 920.09, Florida Statutes, 1951. The important language of this statute is:

> "920.09 Effect of granting new trial.—When a new trial is granted such new trial shall proceed in all respects as if no former trial had been had . . ."

This statute is set forth in full in Appendix B.

STATEMENT OF THE CASE.

Petitioners Dave Kaye and Solly Isaacs were labor organizers employed by the Laundry Workers International Union (R. 20, 21). On March 12, 1951, an information was filed against petitioners in the Criminal Court of Dade County, Florida charging them with assault upon James Newbold with design to effect his death (R. 5).

The information was unsworn when filed. It was sworn to by the County Solicitor on March 13, 1951, the day after it was filed (R. 6). The information was never refiled after the oath had been affixed thereto.

Petitioners pleaded not guilty on April 17, 1951 (R. 10). After a trial by jury, petitioners were found guilty. This conviction was reversed by the Supreme Court of Florida and a new trial awarded on November 14, 1952 (*Kaminski, et al.* v. *State,* 63 So. 2nd 339).

On July 6, 1953, the case came on to be tried again (R. 10). Petitioners moved the Court for permission to withdraw their pleas of not guilty for the purpose of filing a motion to quash the information (R. 8). This motion was denied.

On July 8, 1953, after trial, petitioners were both found guilty and were sentenced to twenty years imprisonment at hard labor. This judgment was affirmed by the Supreme Court of Florida by opinion filed April 13, 1954 (Appendix A; R. 440).

The Federal constitutional questions urged in this petition were first raised by petitioners in their petition for rehearing filed April 27, 1954 (R. 446, 447). The Supreme Court of Florida denied the petition for rehearing on May 27, 1954 (R. 450).

In the petition for rehearing, petitioners contended that their rights under Amendment XIV of the United States Constitution were violated because the Supreme Court of Florida denied petitioners the rights, privileges and immunities vested in petitioners by the State of Florida with reference to the new trial of a criminal case (R. 447).

The Supreme Court of Florida refused to consider petitioners' motion for leave to withdraw their plea and for leave to file a motion to quash the information in the light of the Florida statute; that is, as though there had been

no former trial of the cause. The refusal of the Supreme Court of Florida to grant petitioners the protection of this statute did not become known to petitioners until the opinion of the court was filed on April 13, 1954. This appears from the following language used by the Supreme Court of Florida in its second opinion:

> "The first time any objection was raised as to the propriety of the information was approximately twenty-eight months after it had been filed, after this Court had reversed the judgment for procedural errors and had remanded the case for a new trial."

Prior to this decision, the Supreme Court of Florida had held, as we will hereinafter show, that when a criminal case was remanded for a new trial, it should have the same status as if there had been no previous trial; precisely in accordance with the specific mandate of the Florida statute.

REASONS FOR GRANTING WRIT OF CERTIORARI.

It is respectfully urged that the legal issues presented by this petition raise fundamental Federal questions of due process of law and of the denial to petitioners of vested rights, privileges and immunities. We are mindful of the rule pronounced by this Court that the concept of due process does not include a guarantee of a correct decision to any litigant and that an erroneous decision does not necessarily deny due process of law. However, petitioners urge that the decision of the Supreme Court of Florida failed to grant petitioners the rights vested in them by the Florida statute so that petitioners were denied due process of law and their rights and immunities were abridged.

Section 920.09 of the Florida Statutes provides that when a new trial is granted the new trial shall proceed in all respects as if no former trial had been had. This statute gave petitioners vested and inviolable rights when their

case came up for retrial on July 6, 1953. At that time, petitioners were entitled to have the trial court pass upon their motion to withdraw their plea of not guilty and for leave to file the motion to quash the information as fully and completely as though the motion was made on April 17, 1951, when petitioners' plea was first filed. Only in this manner would petitioners be treated according to the statutory mandate and "in all respects as if no former trial had been had." The Criminal Court of Dade County, Florida, denied this motion.

On review in the Supreme Court of Florida, petitioners were entitled to the protection of the same statute and were entitled to have the Supreme Court of Florida review the discretion exercised by the trial court from the same point of view prescribed by statute; in all respects as if no former trial had been had. On the contrary, the Supreme Court of Florida in its opinion specifically denied petitioners the right and protection granted by the Florida statute. This is shown by the fact that the Court commented upon the passage of twenty-eight months after the filing of the information. Actually petitioners were entitled to have the case decided by the Supreme Court of Florida under and in accordance with the rule expressed in the Florida statute. By failing to apply the statute to the rights of petitioners and by failing to decide the issues on review from the point of view expressed and required by the statute, the Supreme Court of Florida violated the rights of petitioners under Amendment XIV of the United States Constitution.

Not only is the Florida statute clear and specific to the effect that the new trial should have proceeded as if there had been no former trial but the Supreme Court of Florida has itself adopted and expressed the same view. In the case of *Haddock* v. *State,* 141 Fla. 132, 192 So. 802, one of

the Justices of the Supreme Court of Florida in a concurring opinion expressly stated (page 152):

> "It is my view that when the judgment of conviction was reversed and the cause remanded the case then stood in the criminal court of record in the same status as if no trial had been had on the information.
>
> "Entertaining this view, it appears clear to me that when the accused procured the consent of the trial court to withdraw his plea of not guilty and to file a plea in abatement, he was within his rights to attack the information by such plea. A demurrer to the plea or pleas, in abatement put in issue the legal sufficiency of the plea or pleas."

In refusing to apply the Florida statute to this case and in expressly basing their decision on the legally immaterial fact that twenty-eight months had elapsed after the filing of the information before petitioners sought leave to withdraw their plea, the Supreme Court of Florida has in effect denied petitioners a hearing and a remedy and this constitutes a violation of petitioners' rights to due process of law.

In this regard we wish to cite the case of *Brinkerhoff-Faris Co.* v. *Hill*, 281 U. S. 673, 50 S. Ct. 451, 74 L. Ed. 1107. In that case, the Supreme Court of Missouri denied petitioner relief from an alleged discriminatory assessment of taxes in a suit at law on the ground that petitioner had an adequate remedy by administrative action before the State Tax Commission. The Supreme Court of Missouri had previously held that the State Tax Commission had no authority to grant the relief sought. However, the decision of the Supreme Court of Missouri overruled the previous cases and stated that petitioner did have a remedy before the State Tax Commission. By that time it was too late for petitioner to proceed before the Commission. This Court held that petitioner's right to due

process had been infringed. The Court stated 281 U. S. 681, 682:

> "Our present concern is solely with the question whether the plaintiff has been accorded due process in the primary sense,—whether it has had an opportunity to present its case and be heard in its support. Undoubtedly, the state court had the power to construe the statute dealing with the State Tax Commission and to re-examine and overrule the *Laclede* case. Neither of these matters raises a federal question; neither is subject to our review. But, while it is for the state courts to determine the adjective as well as the substantive law of the State, they must, in so doing, accord the parties due process of law. Whether acting through its judiciary or through its legislature, a State may not deprive a person of all existing remedies for the enforcement of a right, which the State has no power to destroy, unless there is, or was, afforded to him some real opportunity to protect it. Compare *Postal Telegraph Cable Co.* v. *Newport,* 247 U. S. 464, 475-6."

In the case of *Joint Anti-Fascist Refugee Committee* v. *McGrath,* 341 U. S. 123, 71 S. Ct. 624, 95 L. Ed. 817, the concurring opinion of Mr. Justice Frankfurter contains the following language (71 S. Ct. at page 643):

> "Fairness of procedure is 'due process in the primary sense.' *Brinkerhoff-Faris Trust & Savings Co.* v. *Hill,* 281 U. S. 673, 681, 50 S. Ct. 451, 454, 74 L. Ed. 1107. It is ingrained in our national traditions and is designed to maintain them. In a variety of situations the Court has enforced this requirement by checking attempts of executives, legislatures, and lower courts to disregard the deep-rooted demands of fair play enshrined in the Constitution. '(T)his court has never held, nor must we now be understood as holding, that administrative officers, when executing the provisions of a statute involving the liberty of persons, may disregard the fundamental principles that inhere in 'due

process of law' as understood at the time of the adoption of the Constitution.'

"'One of these principles is that no person shall be deprived of his liberty without opportunity, at some time, to be heard . . .' The Japanese Immigrant Case (*Yamataya* v. *Fisher*), 189 U. S. 86, 100-101, 23 S. Ct. 611, 614, 47 L. Ed. 721. '(B)y 'due process' is meant one which, following the forms of law, is appropriate to the case, and just to the parties to be affected. It must be pursued in the ordinary mode prescribed by the law; it must be adapted to the end to be attained; and wherever it is necessary for the protection of the parties, it must give them an opportunity to be heard respecting the justice of the judgment sought.' *Hagar* v. *Reclamation District*, No. 108, 111 U. S. 701, 708, 4 S. Ct. 663, 667, 28 L. Ed. 569. 'Before its property can be taken under the edict of an administrative officer, the appellant is entitled to a fair hearing upon the fundamental facts.' *Southern R. Co.* v. *Commonwealth of Virginia ex rel. Shirley*, 290 U. S. 190, 199, 54 S. Ct. 148, 151, 78 L. Ed. 260. 'Whether acting through its judiciary or through its Legislature, a State may not deprive a person of all existing remedies for the enforcement of a right, which the State has no power to destroy, unless there is, or was, afforded to him some real opportunity to protect it.' *Brinkerhoff-Faris Trust & Savings Co.* v. *Hill, supra*, 281 U. S. at page 682, 50 S. Ct. at page 454."

In the recent case of *United States* v. *Shaughnessy*, 74 S. Ct. 499, 98 L. Ed. 416, this Court held that failure of the Board of Immigration Appeals to exercise its own discretion in determining whether an application for suspension of deportation should be granted constituted a denial of due process of law. The Board of Immigration Appeals did not apply its own discretion to the case but denied suspension of deportation solely because petitioner's name appeared on a confidential list of undesirables issued by the attorney general. Although petitioner was

admittedly deportable, this Court reversed. The basis for the result reached by this Court was not the issue of correctness of the decision of the Board of Immigration Appeals but the fact that petitioner had a right to determination of his case by the Board in the exercise of its own discretion.

Similarly, in the case at bar, petitioners have the right to review of the discretion exercised by the trial court in accordance with the mandate of the statute. By showing in its opinion that the statute was expressly disregarded, the Supreme Court of Florida demonstrated that petitioners were denied due process of law. Due process of law requires that petitioners' cause be reviewed by the Supreme Court of Florida in accordance with the statute in question regardless of whether or not the Supreme Court ultimately will arrive at the same or a different result.

We wish to cite the following language used by this Court in the opinion in the case of the *United States* v. *Shaughnessy*, 74 S. Ct. 499 at pages 503 to 504:

> "It is important to emphasize that we are not here reviewing and reversing the manner in which discretion was exercised. If such were the case we would be discussing the evidence in the record supporting or undermining the alien's claim to discretionary relief. Rather, we object to the Board's alleged failure to exercise its own discretion, contrary to existing valid regulations.
>
> "If petitioner can prove the allegation he should receive a new hearing before the Board without the burden of previous proscription by the list. After the recall or cancellation of the list the Board must rule out any consideration thereof and in arriving at its decision exercise its own independent discretion, after a fair hearing, which is nothing more than what the regulations accord petitioner as a right. Of course, he may be unable to prove his allegation before the District Court; but he is entitled to the opportunity

to try. If successful, he may still fail to convince the Board or the Attorney General, in the exercise of their discretion, that he is entitled to suspension, but at least he will have been afforded that due process required by the regulations in such proceedings."

We wish finally to demonstrate the importance of the affidavit on the information under Florida law and the fact that the motion to quash the information which petitioners wish to file was well-founded.

Article 5, Section 24 of the Constitution of the State of Florida provides for the establishment of criminal courts of record. Article 5, Section 28 of the Constitution of the State of Florida, provides:

> "All offenses triable in such court shall be prosecuted upon information under oath, to be filed by the prosecuting attorney but the grand jury of the Circuit Court for the County in which said criminal court is held may indict for offenses triable in the criminal court."

Section 32.18, Florida Statutes, 1951, provides:

> "(1) All offenses triable in the criminal courts of record shall be prosecuted upon information under oath to be filed by the county solicitor."

Thus, the Supreme Court of Florida has deprived petitioners of substantial rights under the Florida statutes and under the Florida Constitution to such a degree as to constitute a denial of due process of law.

The gist of the Federal question raised by petitioners is not interpretation of the Florida statute but the refusal of the Supreme Court of Florida to grant petitioners the privilege and right granted them by the Florida statute. The statute is not referred to or even mentioned in the entire opinion of the Florida Supreme Court, and therefore the statute remains patently disregarded by that Court.

CONCLUSION.

For the foregoing reasons, it is respectfully urged that this petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX A.

Opinion of the Supreme Court of Florida filed April 13, 1954, Case No. 24,792, as follows:

An appeal from the Criminal Court of Record of Dade County,

Ben C. Willard, Judge.

Dayton & Dayton and Charlie Luckie, Jr., for Appellants.

Richard W. Ervin, Attorney General and Mark R. Hawes, Assistant Attorney General, for Appellee.

SEBRING, *J.*:

Kaminski and Isaacs were tried and found guilty of assault with intent to commit murder. Judgment and sentence were entered and the defendants appealed.

The information in the case, which appears to have been sworn to by the County Solicitor on March 13, 1951, was filed in the Criminal Court of Record of Dade County on March 12, 1951. Subsequently, the defendants entered a plea of not guilty to the charge contained in the information and went to trial. The jury returned a verdict against them and judgment was rendered, from which the defendants appealed. This Court reversed the judgment for procedural errors in respect to the admission of evidence and ordered a new trial. *Kaminski, et al.* v. *State (Fla.)*, 63 So. 2d 339.

After our mandate went down the case was set for the second trial on the information. At the beginning of the trial the defendants filed their motion for leave to withdraw their pleas of not guilty and to file a motion to quash

the information on the ground that "it affirmatively appears from the records . . . that the said information . . . filed . . . on the 12th day of March, 1951 . . . was not sworn to by the County Solicitor . . . until the 13th day of March, 1951, and . . . after the swearing . . . was not refiled."

The defendants have assigned as error the denial of the trial court.

It is provided by section 909.01, Florida Statutes 1951, that "Either prior to or upon being arraigned, the defendant shall, unless the court grants him further time, either move to quash the . . . information or plead thereto, or do both. If he moves to quash, without also pleading, and the motion is withdrawn or overruled, he shall immediately plead."

Section 909.06, Florida Statutes 1951, provides, in part: "If the defendant does not move to quash the . . . information before or at the time he pleads thereto he shall be taken to have waived all objections which are grounds for a motion to quash . . .."

As appears from the record, the information was filed in the case on March 12, 1951. On April 17, 1951, the defendants were arraigned and pleaded not guilty. The first time any objection was raised as to the propriety of the information was approximately 28 months after it had been filed, after this Court had reversed the judgment for procedural errors and had remanded the case for a new trial. Since the judgment of reversal was predicated upon error in the course of trial, "the effect of the reversal (was to restore) the accused to the point where that error was committed," at the point of the commencement of trial upon the plea of not guilty theretofore entered. *Ex parte Livingston*, 116 Fla. 640, 156 So. 612. It cannot be said that the court abused its discretion in refusing at that point

to permit defendant to withdraw his plea and file a motion to quash. Section 909.06, *supra; Bryan* v. *State,* 41 Fla. 643, 26 So. 1022; *Haddock* v. *State,* 141 Fla. 132, 192 So. 802; *Shumake* v. *State,* 90 Fla. 133, 105 So. 314; *Hays* v. *State,* 100 Fla. 734, 130 So. 6 . . . See also *Johnston* v. *State,* 58 Fla. 68, 50 So. 529; 27 Am. Jur., Ind. and Inf., section 188, n. 14 and 15; 42 C. J. S., Ind. and Inf., section 331.

The only other question on the appeal is whether the evidence was sufficient to sustain the verdict and judgment. We are of the view that this question must be answered in the affirmative.

The judgment appealed from should be affirmed.

It is so ordered.

ROBERTS, *C. J.*, TERRELL, *J.* and ROGERS, *Associate Justice,* Concur.

APPENDIX B.

FLORIDA STATUTES, 1951.

920.09 *Effect of Granting New Trial.*—When a new trial is granted such new trial shall proceed in all respects as if no former trial had been had, but where an offense is divided into degrees and the defendant has been convicted of a lesser degree, he cannot thereafter be prosecuted for a higher degree of the same offense.

All the testimony in such former trial must be produced anew, except of witnesses who are absent from the state or dead, in which event the evidence of such witnesses on former trial may be presented as the same was taken and transcribed by the court reporter. Before the introduction of the evidence of an absent witness, the party introducing same must show that due diligence has been used to procure the attendance of said witness at the trial, and that the witness is not absent by consent or connivance of the party moving to introduce the evidence of such witness on the former trial.

APPENDIX "C"

JUDGMENT OF THE SUPREME COURT OF THE STATE OF FLORIDA

IN THE SUPREME COURT OF FLORIDA, JANUARY TERM, A. D. 1954, SPECIAL DIVISION A

Supreme Court Case # 24,792

DAVE KAMINSKI, alias DAVE KAMINSKY, alias DAVE KAYE, and SOLLY ISAACS, *Appellants*

vs.

STATE OF FLORIDA

JUDGMENT—April 13, 1954

This cause having heretofore been submitted to the Court upon the transcript of the record of the judgment herein, and briefs and argument of counsel for the respective parties, and the record having been seen and inspected, and the Court being now advised of its judgment to be given in the premises, it seems to the Court that there is no error in the said judgment; it is, therefore, considered, ordered and adjudged by the Court that the said judgment of the Circuit Court be and the same is hereby affirmed; it is further ordered by the Court that the Appellee do have and recover of and from the Appellants its costs by it in this behalf expended, which costs are taxed in the sum of $——, all of which is ordered to be certified to the Court below.

The Opinion of the Court in this cause prepared by Mr. Justice SEBRING was this day ordered to be filed.

APPENDIX "D"

ORDER OF THE SUPREME COURT OF THE STATE OF FLORIDA DENYING PETITION FOR REHEARING

IN THE SUPREME COURT OF FLORIDA, JANUARY TERM, A. D. 1954, SPECIAL DIVISION A

Supreme Court Case No. 24,792

DAVE KAMINSKI, alias DAVE KAMINSKY, alias DAVE KAYE, and SOLLY ISAACS, *Appellants*

vs.

STATE OF FLORIDA

ORDER DENYING REHEARING—Filed May 27, 1954

Counsel for Appellants having filed in this cause Petition for Rehearing and having been considered it is ordered by the Court that said Petition be and the same is hereby denied.

(The mandate in this cause has today been issued and mailed to the clerk of the Criminal Court of Record for Dade County.)

[File endorsement omitted.]